

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of

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Toll Free Service Access Codes

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CC Docket No. 95-155

COMMENTS OF BASS PRO SHOPS

Bass Pro Shops ("Bass Pro"), by counsel and pursuant to 47 C.F.R. § 1.415, submits these comments in response to the Commission's Notice of Proposed Rulemaking ("NPRM") in the above-captioned proceeding.

I. INTRODUCTION

The Commission has recognized that 800 number subscribers may have a substantial financial interest in retaining equivalent vanity numbers drawn from a new toll free code, and instituted this proceeding to ensure a proper balance between this interest and the need to manage a limited numbering resource.^{1/} Bass Pro, a trade name for BPS Catalog, L.P., is a retail sporting goods company that markets its products through the use of catalogs, toll free telephone numbers, and other common carriers. Bass Pro invests millions of dollars each year promoting its 800 vanity numbers nationwide and conducts the vast majority of its business by means of these numbers. As a result, many consumers now closely associate Bass Pro's vanity numbers with high quality sports equipment and friendly, courteous service. Therefore, Bass

^{1/} NPRM ¶ 35.

Pro possesses a significant economic interest in its toll free numbers and has a vital stake in the outcome of this proceeding.

II. BASS PRO WILL SUFFER SUBSTANTIAL HARM IF IT IS NOT PERMITTED TO RETAIN ITS EQUIVALENT VANITY NUMBERS IN NEW TOLL FREE CODES.

Telephone numbers beginning with "1-800" are widely recognized as toll free. When the 888 service access code ("SAC") becomes available in March 1996, however, consumers soon will learn to associate both 800 and 888 numbers with toll free service. This inevitably will produce some confusion concerning the proper prefix to dial to reach a particular toll free subscriber. Consumer confusion will have several undesirable effects. First, it will facilitate the ability of an 800 subscriber's competitors to trade on the goodwill the subscriber has developed in its 800 vanity number.^{2/} For example, if a competitor of Bass Pro were to obtain the number 1-888-BASSPRO, it would benefit unfairly from the reputation Bass Pro has established for its number, and Bass Pro could lose potential customers. Second, Bass Pro's reputation could suffer if callers to 1-888-BASSPRO receive poor service and unwittingly assume the service is from Bass Pro. Finally, customers who reach 1-888-BASSPRO, either by mistake or because they assume it is one of Bass Pro's numbers, easily could be misled by a con-artist

^{2/} Harm also will result if *non-competitors* obtain equivalent toll free numbers. An 888 subscriber, for example, will be billed for misdialled calls (those calls intended for an 800 subscriber), and the 800 subscriber could lose potential customers.

to disclose sensitive credit card information in order to place a bogus catalog order.^{3/} None of these results should be permitted.

III. TOLL FREE SUBSCRIBERS WITH AN ECONOMIC INTEREST IN THEIR TELEPHONE NUMBERS SHOULD HAVE THE OPTION OF PROTECTING THAT INTEREST THROUGH A RIGHT OF FIRST REFUSAL.

The most effective way to solve the problems discussed above is to provide toll free subscribers with a right of first refusal concerning the toll free analogues to their numbers.^{4/} This right should be extended to all toll free subscribers regardless of the apparent value of their numbers. To exercise the right, however, a subscriber should be required to pay a reasonable, one-time fee of at least \$5,000.^{5/} The one-time fee will serve as a self-selecting mechanism, helping to ensure that only those subscribers with a substantial and quantifiable economic interest in their toll free numbers reserve numbers from the pool of new toll free SACs.^{6/}

^{3/} Similar scams are not difficult to imagine. A con-artist could advertise in local markets as Bass Pro, for example, using the 888 analogue to one of Bass Pro's vanity numbers for credibility, and thereby could defraud thousands of consumers into disclosing credit card information.

^{4/} Since the problems associated with 888 vanity numbers also will be present with respect to other future toll free SACs (*i.e.*, 877, 866, etc.), a right of first refusal should attach to all future codes as well.

^{5/} Revenues generated by means of this fee should be used to educate consumers about future toll free SACs through public service announcements. *See* NPRM ¶ 41.

^{6/} Since a one-time fee alone may be inadequate to deter number brokering and warehousing, Bass Pro strongly urges the Commission to adopt effective rules to prevent these practices. In this regard, Bass Pro supports the Commission's proposal to cap the amount of numbers a RespOrg may hold in reserve status. *Id.* ¶ 33. Bass Pro also supports the Commission's conclusion that RespOrgs should be required to certify on a quarterly basis that "(1) there is an identified subscriber who has agreed to be billed for service associated with each toll free number requested from the database; and (2) there is an identified, billed subscriber (continued...)"

Vesting 800 subscribers with a right of first refusal will properly place the burden of appraising vanity numbers on the parties best able to do so -- those who will suffer the most harm if their 888 analogues are assigned to other entities. In other words, a right of first refusal will permit incumbent subscribers to judge individually whether the exercise price for the right outweighs the potential economic losses their businesses may sustain if they allow their numbers to be otherwise assigned. Furthermore, a right of first refusal will lessen consumer confusion by reducing the likelihood that direct competitors will share toll free analogues.

The Commission has asked whether subscribers should be required to pay for the right of first refusal through a competitive bidding process.^{7/} Competitive bidding should not be used for two reasons. First, incumbent subscribers with little capital would be unfairly prejudiced under such a system since they easily could be outbid by a well financed competitor. Second, the only parties likely to bid against incumbent subscribers are direct business competitors or speculators who intend to sell the numbers to competitors. If either of these parties were to outbid the incumbent, the Commission's purpose for establishing a right of first refusal (to protect the incumbent's goodwill in a number) would be frustrated.^{8/}

^{6/}(...continued)

before switching a number from reserved or assigned to working status." *Id.* ¶ 34. Finally, Bass Pro encourages the Commission to adopt rules patterned after the industry guidelines against brokering telephone numbers. *See Industry Guidelines* § 2.2.1; NPRM ¶ 16. Stringent enforcement of anti-brokering and warehousing rules, in conjunction with the option fee requirement, should help to prevent the inefficient depletion of numbering resources.

^{7/} NPRM ¶ 41.

^{8/} *See id.* ¶ 35.

IV. NO OTHER SOLUTION PROPOSED BY THE COMMISSION WILL ADEQUATELY PROTECT THE INTERESTS OF TOLL FREE SUBSCRIBERS.

A. Industrial Classifications

As an alternative to a right of first refusal, the Commission suggests that Standard Industrial Classification ("SIC") codes could be used to categorize toll free subscribers by the type of business in which they engage.^{9/} Under this proposal, toll free subscribers in the same line of business would be unable to obtain equivalent telephone numbers beginning with different toll free codes. The Commission states that this would "allay[] the fears of current 800 number subscribers that a competing business would obtain the equivalent number in a new toll free code"^{10/} Unfortunately, this proposal will not work.

Assigning an industry code to each toll free subscriber may be insufficient to identify business competitors. As a catalog/mail-order retailer, for example, the SIC code for Bass Pro is 5961. All Bass Pro competitors, however, are not catalog/mail-order houses. Retail sporting goods stores also compete against Bass Pro (SIC code 5941), as do local service station/tackle shops (SIC code 5541). Moreover, the Commission would have to develop elaborate administrative procedures to deal with the inevitable appeals from parties who believe their numbers were improperly managed, or that their competitors were not properly identified.

Finally, implementing an SIC screening system would significantly delay the introduction of the 888 SAC. Database Services Management, Inc. ("DSMI"), a subsidiary of Bellcore which administers the SMS/800 database, would have to develop and install new software for

^{9/} *Id.* ¶ 44.

^{10/} *Id.* ¶ 45.

the SMS that is capable of screening reservation requests in the manner outlined in the NPRM. This would not be a simple task. DSMI also would have to enter the SIC code for every current 800 subscriber into the SMS database before a single 888 number could be reserved. Given the amount of work required to implement an SIC screening mechanism, it is extremely unlikely that the infrastructure could be in place before the first 888 reservation is taken in March 1996.

B. Late Release Procedure

As another alternative, the Commission suggests requiring the administrator of the SMS "to release those 888 numbers identified as equivalent toll free vanity numbers at the end of the toll free assignment pool."¹¹ As an initial matter, it is unclear how numbers would be identified as vanity numbers under this proposal, and therefore held for later release. Moreover, assuming these number were properly identified, the proposal neglects to explain the mechanism by which competitors of a business with an 800 vanity number would be prevented from waiting until the end of the pool before requesting the equivalent 888 number. For example, nothing would prevent a competitor of Bass Pro from simply waiting until all non-vanity 888 numbers are assigned, and then reserving 1-888-BASSPRO. In fact, there is every incentive for competitors to do just this. This proposal may postpone the problems discussed above in Section II, but it fails satisfactorily to resolve them, and for this reason it should be rejected.

C. Transitional Gateway

The Commission also suggests requiring carriers to provide a "transitional gateway intercept" during the change to a new toll free access code.¹² According to this proposal,

¹¹ *Id.* ¶ 46.

¹² *Id.*

when a consumer called either 1-800-BASSPRO or 1-888-BASSPRO, the consumer would hear a recorded message directing him either to press "1" to be connected to Bass Pro, or to press "2" to be connected to a competitor of Bass Pro. This proposal fails to prevent a company's competitors from exploiting the goodwill and equity it has invested in its 800 number. Moreover, it would increase, rather than decrease, consumer confusion. Callers who routinely call 1-800-BASSPRO, and who are unaware that another sporting goods retailer now has the number 1-888-BASSPRO, naturally will be confused by a message that requires them to dial additional numbers to reach Bass Pro. Moreover, the cost of providing such transitional messages will be substantial, yet the proposal makes no mention of how it would be funded. Finally, as with the SIC screening proposal, deploying the software required to provide transitional messages is likely to delay the implementation of 888 beyond March 1996.

D. Partitioning by Use

The Commission also suggests partitioning toll free service by use.^{13/} Specifically, business entities and the majority of vanity number holders would be required to use the 800 code while subscribers who use their numbers for personal and/or paging purposes would be relegated to the 888 code. As with the "Late Release" proposal discussed above, this proposal temporarily would eliminate the possibility of a business competitor obtaining the 888 analogue of an incumbent's 800 vanity number, but it is not a long term solution to the problem of 800 exhaust. Once business subscribers use up the supply of 800 numbers, the industry will be faced with exactly the same problems it faces now. Since this proposal fails satisfactorily to resolve these problems, it should be rejected.

^{13/} *Id.*

E. Trademark Protection

Finally, the Commission asks whether "federal trademark law alone will sufficiently protect the current holders of 800 vanity numbers against new code assignments that may produce the same vanity acronyms."^{14/} Trademark law may protect some 800 subscribers, but it will not adequately protect all vanity number subscribers since some words and/or numbers are not be protectible.^{15/} Furthermore, the two U.S. Courts of Appeals that have addressed the issue of whether a telephone number may be trademarked have issued conflicting rulings.^{16/} Since the U.S. Supreme Court has not yet resolved this conflict, 800 subscribers cannot rely confidently on trademark law to protect the equity they have invested in their toll free numbers.

V. CONCLUSION

For the reasons discussed herein, the Commission should establish a right of first refusal for holders of 800 numbers. The Commission also should require a reasonable, one-time fee for exercising such right to help ensure that toll free numbers are allocated fairly and efficiently.

^{14/} *Id.* ¶ 40.

^{15/} *See, e.g.,* A.J. Canfield Co. v. Honickman, 808 F.2d 291, 304 (3d Cir. 1986)("Courts refuse to protect a generic term because competitors need it more to describe their goods than the claimed markholder needs it to distinguish its goods from others.").

^{16/} *Compare* Dranoff-Perlstein Assocs. v. Sklar, 967 F.2d 852 (3d Cir. 1992)(holding that telephone numbers which correlate to generic terms do not merit trademark protection) *with* Dial-A-Mattress Franchise Corp. v. Page, 880 F.2d 675 (2d Cir. 1989)(holding that telephone numbers that correlate to generic terms are protectible).

No other solution that the Commission has proposed will achieve this end as effectively as a right of first refusal.

Respectfully submitted,

By: 

Edwin N. Lavergne
Darren L. Nunn
Ginsburg, Feldman and Bress,
Chartered
1250 Connecticut Avenue, NW
Washington, DC 20036
(202) 637-9000

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